

# Even in Prison

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Maximilian Steinbeis

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There is certainly no lack of comment-worthy topics this week. Nevertheless, I decided to cede this week's editorial to IGOR TULEYA, judge at the Warsaw District Court. Why? Read for yourself:

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Judge Igor Tuleya:

"In December 2016, a vote on the budget in the Polish lower house of Parliament, the Sejm, was taking place under peculiar circumstances. Opposition deputies were prevented from participating in parliamentary debates. The debate was moved from the plenary hall to the so-called Column Hall (a smaller assembly room). Opposition members were physically blocked from approaching the podium and thus deliberately prevented from speaking. All this had been planned in advance by the governing party „Law and Justice“. Several MPs submitted a notification that the Speaker of the Sejm (the lower chamber of Polish parliament) and his subordinate officials had committed a crime. The politicized prosecutors refused to investigate the case. A year later, they admitted a complaint against this decision. The prosecutors agreed with the applicants, ordered the investigation to be continued, and also informed the law enforcement authorities about the alleged crime that the leaders of the Law and Justice party could have committed, namely that they committed perjury while giving their testimonies.

I was the judge in that case.

For the last five years I have been defending the independence of the judiciary and judicial independence in Poland. I publicly criticize the government for breaking the rule of law and not following the principles enshrined in the Constitution. For this reason, the Disciplinary Commissioners, reporting to the Minister of Justice, are currently conducting another seven cases against me.

Nearly three years after the "Column Hall case", the Prosecutor's Office asked the so-called „Disciplinary Chamber“ of the Supreme Court to remove my judicial immunity. They claim that by obliging it to continue the investigation, I failed to fulfill my official duties, exceeded my authority as a judge and disclosed and disseminated information from the discontinued preparatory proceedings. Indeed, I proceeded openly and journalists took part in my court's session. However, it is fully permitted by the Code of Criminal Procedure. I did not reveal any secrets. The sessions of the Sejm were reported by media, and the undemocratic behaviour of the Law and Justice party caused a wave of social protests which were pacified by the police.

And then came November 18, 2020. The „Disciplinary Chamber“ lifted my immunity and suspended me from official duties. After 25 years, according to that body, I ceased being a judge. I am facing a penalty of 3 years in prison. I did not participate

in the hearing before this body. The so-called Disciplinary Chamber is not an independent court, and its members are no independent judges. The “judges” are former prosecutors and those associated with the executive. This much was established by the Polish Supreme Court, and this was confirmed by the decision on the application of the CJEU interim measures. This body should not proceed at all. For this reason, I did not enter the courtroom where they were proceeding. Had I done otherwise, I would have legitimized lawlessness. I did not, and could not, do it.

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# REC

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I announced publicly that I would not appear before the Prosecutor and would not allow myself to be heard as a defendant. I did not do this to avoid responsibility, but by continuing to participate in this farce, I would have accepted the illegal activities of the so-called Disciplinary Chamber. What will the Prosecutor do? He will summon me by force or perhaps – recognizing that I am obstructing the criminal proceedings

– will make a motion for my arrest. What will I do? Professor Stanisław Zabłocki, a former President of the Supreme Court, a recognized authority for all lawyers, had appealed to Polish judges somewhat biblically: “Let your words be: Yes, yes; no no. You have to be consistent. Clear signals must be given to the public. You cannot passively observe the bad things going on with the Polish legal system”. That is why I will continue to tell the truth and till the end, even in prison, to defend the rule of law in Europe. In Europe? Yes, because my home country Poland is still in the European Union. I perceive the destruction of the Polish justice system as a destruction of Europe as a community of values and legal rules.

I thank the European lawyers for all their support. It is touching and extremely important to all Polish judges. But what should I tell the European officials and politicians? I understand that, just as in 1939 some of them did not want to “die for Gdańsk/Danzig”, today some of you do not want to die for the rule of law in Poland. So you continue to deliberate and look at the blue sky with satisfaction. While in prison, I probably won’t be able to do that. Thus please remember the words of Martin Luther King who had said that injustice in one place is a threat to justice everywhere.”

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## The week on Verfassungsblog

Meanwhile, Poland and Hungary keep blocking the Corona recovery funds to escape the **financial sanctions** for their rule of law violations. Can the gridlock be dissolved if the others cut those two countries loose and settle for an enhanced cooperation among themselves? [MARTIN NETTESHEIM](#) thinks that would hardly fly under EU law.

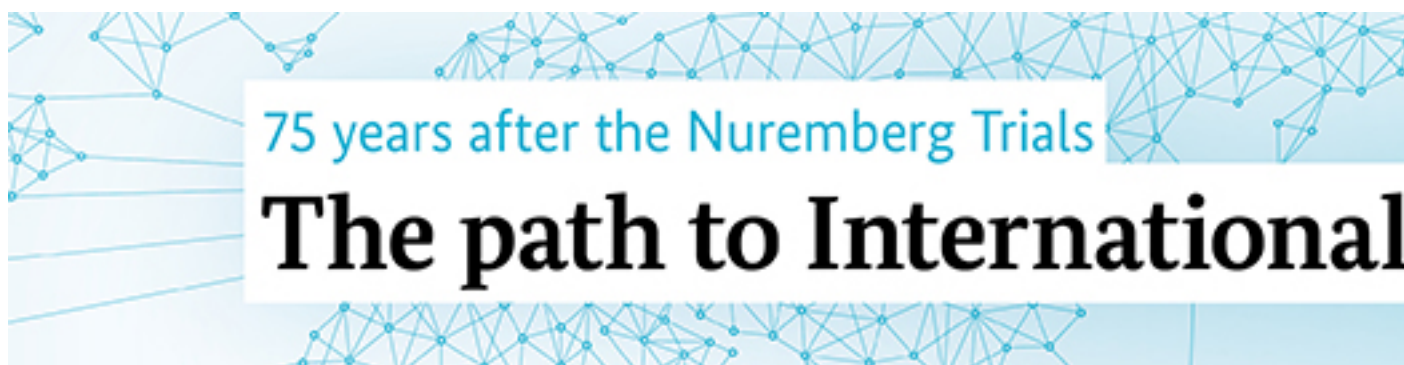
Seemingly unrelated, a flurry of constitutional activity can be observed in **Hungary** on the national level right now. [GÁBOR HALMAI, GÁBOR MÉSZÁROS and KIM LANE SCHEPPELE](#) reveal how the Orbán government is sacrificing its own constitution to its goal to cling to power. Two amendments stand out for their devastating consequences for the rights of LGBTQI people in Hungary. [ESZTER POLGÁRI and TAMÁS DOMBOS](#) argue that the institutionalized trans- and homophobia behind these changes in the constitution could only be deconstructed with difficulty. In the second part of their analysis, [GÁBOR HALMAI, GÁBOR MÉSZÁROS and KIM LANE SCHEPPELE](#) place this and other details of the current Hungarian constitutional amendment in the context of EU financial sanctions plans. One has to give it to them: The Orbán government is using constitutional law to frustrate these plans before they have even been realized in quite an ingenious way.

The European Court of Justice recently ruled against Hungary in the **CEU case**, the Budapest university driven into exile by the Orbán government (where many Verfassungsblog authors research and teach). CSONGOR ISTVÁN NÁGY sees the decision to find Hungary in violation of GATS rules, of all things, as a parallel to the famous trial against the US mobster Al Capone, who was undoubtedly guilty of far worse crimes than tax fraud but that is what he was caught with.

In Poland and the USA, controversial court decisions are driving the debate about the **right to abortion**. In Germany, too, the Federal Constitutional Court had played a decisive role in shaping the abortion law. VERA SCHÜRMANN thinks it is time to put abortion law back on the parliamentary agenda.

In **Turkey** last week, for the second time in 16 months, the head of the Central Bank was dismissed. At the same time the Minister of Finance – who is also President Erdogan’s son-in-law – resigned from his post. Many are now questioning the real independence of this institution, which [CEM TECIMER](#) sometimes considers the least interesting of all questions raised in this matter. Much more interesting are these: Does anyone even care if independence is no longer maintained? Is bureaucracy standing in the way of authoritarianism? What weaknesses of the president does the institutional power game reveal?

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Digital debate, Monday, 23 Nov 2020, 18.00 CET

Livestream: [www.bmjv.de/nuremberg](http://www.bmjv.de/nuremberg)

Together with high-profile representatives from the judiciary, human rights defenders and researchers, **German Minister of Justice Christine Lambrecht** will discuss how crimes against humanity are prosecuted before German and international courts today. Panelists are, among others, **Federal Public Prosecutor General Peter Frank**, Syrian human rights attorney, **Anwar al-Bunni**, and the German judge at the IRMCT in The Hague, **Claudia Hoefler**.

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The **German Bundestag** was in turmoil this week, on the occasion of the vote on the new legal basis for anti-Covid-19 measures. In our crisis podcast Corona Constitutional, I talked to [HANS-MICHAEL HEINIG](#) about the mistrust that this piece of legislation arouses in parts of the population and justified and unjustified criticism of the law and the procedure in which it came about. [UWE VOLKMANN](#) takes a critical look at the result: while there is much to like about it, he finds one thing in particular objectionable, namely that it still remains unclear whose protection the law primarily aims at – that of the population against infection or that of the health system against collapse.

Last Wednesday thousands of people **demonstrated** once again in Berlin against the pandemic measures but also against the passing of the new infection protection law. However, no protests were allowed directly in front of the building where it happened: the *Bundestag*. [CHRISTIAN NEUMEIER](#) explains why permission is needed at all, what the Ministry of the Interior has to do with it and which function the constitution ascribes to parliament in that matter – and which we should attribute to it.

**Syrian refugees** who flee from being drafted to the army have a right to asylum in Germany, not just subsidiary protection. This is the verdict of the ECJ which, as [CONSTANTIN HRUSCHKA](#) notes, may also affect final decisions.

The **ECtHR** has ruled against Germany at the end of October because a prisoner was unable to receive compensation for illegal body searches. This violated the ban on degrading treatment, it said, since immaterial damages to the victims of serious fundamental rights violations would also have to be compensated. [EVA NEUMANN](#) comments.

[KATHRIN STRAUSS](#) draws our attention to a little noticed decision by the Administrative Court of Appeals of Baden-Württemberg: If an applicant for German citizenship refuses the **handshake** ritual with the clerk who performs the act of naturalisation, may that be a reason to withhold it? Yes, says the court, which, in Strauss' critical view, only creates a "compulsion to conformity".

The notorious **holocaust denier** Horst Mahler was released from prison last month, and now as he is at large again he is rather unlikely to stop his crime anytime soon. So what to do? If the public prosecutor's office has its way, he will have to report all his publications at least one week in advance. [ANDREAS ZÖLLNER](#) considers this constitutionally untenable: The Basic Law forbids censorship even of extremists.

In Poland and the USA obviously the **right to abortion** depends very much on courts. In Germany, too, the Federal Constitutional Court used to take decisive influence in shaping abortion law, at the expense of parliamentary deliberation. [VERA SCHÜRMANN](#) thinks it is time to put abortion law back on the parliamentary agenda.

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While the German capital **Berlin** is famous for many things, the quality of its public services is not one of them. The case that [KLAUS FERDINAND GÄRDITZ](#) is analyzing, however, reveals a lot more than just poor administration: The Berlin police has summoned a “suspect” for interrogation because he allegedly hit a woman on the wrist – only the alleged perpetrator is six years old and his victim is his elementary school teacher. In Gärditz’s opinion, the only crime in play here is the prosecution of innocent people which, under sec. 344 of the German penal code, is punishable with one to ten years of prison.

In the *Bundestag* there are two draft laws on the table, both of which seek to guarantee **gender self-determination** in the entry of the sexes in the civil register. According to [RONJA HESS](#), the public hearing in the Committee for Home Affairs has shown both the weakness of the arguments of the proponents of the status quo and the inevitability of a reform.

A year and a half ago, hundreds of thousands took to the streets against the **upload filter** Article 17 of the EU Copyright Directive. Now it is being argued in court: JULIA REDA reports in [German](#) and [English](#) on the hearing about the Polish lawsuit and explains why Article 17 is hardly compatible with the previous jurisprudence of the ECJ and the ECtHR. Even if the fate of the article is uncertain: the member states are running out of time, the directive must be implemented by the middle of next year. If the Court will hand down its decision in time remains to be seen.

**Climate change** is also a risk factor for the financial and banking system. Nevertheless, banks continue to invest in CO2-intensive sectors of the economy while making insufficient provision for potential losses. In its 2020 Draft Guide on Climate-Related and Environmental Risks, the ECB has set out how it intends to tackle the problem. However, [AGNIESZKA SMOLE#SKA](#) and [JENS VAN 'T KLOOSTER](#) are skeptical about whether the approach chosen will be successful. In their view, the ECB will not be able to avoid taking on a more political role if it is serious about a “green” banking system.

That’s all for this week. Please don’t forget to support us on [Steady](#), by Paypal (paypal@verfassungsblog.de) or bank transfer (IBAN DE41 1001 0010 0923 7441 03, BIC PBNKDEFF). Many thanks and all the best to you,

Max Steinbeis

